Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	
Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992	MM Docket No. 92-265
Development of Competition and Diversity in Video Programming Distribution and Carriage	

EX PARTE RESPONSE OF DIRECTV, INC.

DIRECTV, Inc. ("DIRECTV"), pursuant to Section 1.1206 of the Commission's rules, hereby submits this ex parte presentation in connection with the above-captioned proceeding.

I. INTRODUCTION

As it works to resolve the issues raised on reconsideration of its new program access rules,[1/] the Commission has received several ex parte presentations in the previous few months regarding the reconsideration petition filed by the National

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1/ Development of Competition and Diversity in Video Programming Distribution and Carriage, First Report and Order, MM Docket 92-265, 8 FCC Rcd 3359 (1993) ("Program Access Order").

Telecommunications Cooperative ("NRTC").[2/] NRTC has requested the Commission to reconsider the scope of Section 76.1002(c)(1) of the rules, which is the implementing regulation for Section 628(c)(2)(C) of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (the "1992 Cable Act"). Section 628(c)(2)(C) contains a broad, per se ban on "practices, understandings, arrangements, and activities . . . that prevent a multichannel video programming distributor ("MVPD") from obtaining any such programming from any satellite cable programming vendor in which a cable operator has an attributable interest" in areas that are unserved by cable operators.[3/] Section 76.1002(c)(1) of the Commission's new rules, however, is drafted more narrowly than the statute to cover only exclusionary practices between "cable operators" and vertically integrated programmers.

NRTC has argued -- and DIRECTV agrees -- that the Commission should not limit the scope of Section 628(c)(2)(C) in this manner, since by its terms the statutory

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2/ On November 19, 1993, NRTC filed with the FCC a written ex parte presentation reiterating and highlighting points made in its reconsideration petition. NRTC, Ex Parte Presentation By the National Rural Telecommunications Cooperative, MM Docket No. 92-265 (Nov. 19, 1993). On January 24, 1994, United States Satellite Broadcasting Company, Inc. ("USSB") responded to NRTC's presentation with a filing totaling 95-pages of text and attachments. See Ex Parte Response to Ex Parte Presentation By the National Rural Telecommunications Cooperative, MM Docket No. 92-265 (Jan. 24. 1994) ("USSB Ex Parte"). On March 4, 1994, NRTC filed a second ex parte response to USSB's filing. See NRTC, Second Ex Parte Presentation By the National Rural Telecommunications Cooperative, MM Docket No. 92-265 (March 4, 1994). Viacom filed a written ex parte presentation on March 28, 1994, see Ex Parte Letter of Lawrence W. Secrest, III to James Olson, Chief, Competition Division, Cable Services Bureau, MM Docket No. 92-265 (March 28, 1994) ("Viacom Ex Parte"), and HBO followed suit on April 15, 1994. See Ex Parte Response of Home Box Office to Ex Parte Presentations of the National Rural Telecommunications Cooperative, MM Docket No. 92-265 (April 15, 1994) ("HBO Ex Parte").

3/ 47 U.S.C. § 628(c)(2)(C).

provision plainly prohibits exclusionary practices and conduct beyond arrangements between vertically integrated programmers and cable operators. DIRECTV believes that NRTC's position is supported by a plain reading of the statutory language, as well as the legislative history and purpose of the 1992 Cable Act.[4/]

While DIRECTV has supported NRTC's efforts to clarify the Commission's implementation of Section 628(c)(2)(C), DIRECTV nevertheless has been apprehensive that cable interests would opportunistically attempt to open up another "front" in their continuing assault on the program access protections of the 1992 Cable Act -- which have been fundamental to DIRECTV's ability to acquire programming and compete -- in the same way they sought to undercut the program access rules in the recent Primestar Partners case in the

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4/ NRTC's textual reading of the specific provision, which sets forth exclusive arrangements with cable operators as an illustrative subset of a **broader** category of anticompetitive practices, is clearly correct. As NRTC observes:

> The phrase between the two commas in Section 628(c)(2)(C) (i.e., ",including exclusive contracts for satellite cable programming or satellite broadcast programming between a cable operator and a satellite cable programming vendor or satellite broadcast programming vendor,") is only one example of the type of conduct that is prohibited. It is an illustrative example, not an all-inclusive prohibition within the statute. Clearly, Section 628(c)(2)(C) is not limited in scope solely to cable operators.

NRTC Petition for Reconsideration at 12-13; see NRTC Second Ex Parte at 9-12. Those who oppose NRTC's interpretation do so by looking to other provisions of Section 628 that are indeed more narrowly drafted to address only contracts with "cable operators," and to ambiguous legislative history of the statute. DIRECTV believes that the plain meaning of the text should govern, in accordance with traditional principles of statutory construction and administrative law. See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842 (1984) (stating that where Congress has spoken directly to the question at issue through the plain language of the statute, "that is the end of the matter").

Southern District of New York.[5/] Thus, in its Reply to oppositions in the reconsideration round, DIRECTV urged the FCC to avoid making broad policy pronouncements concerning the propriety of exclusive contracts between programming vendors and non-cable MVPDs. DIRECTV believed that such issues would best be framed in the context of specific program access complaints invoking the Commission's general prohibition against anticompetitive practices and specific prohibition against non-price discrimination.[6/] Although DIRECTV continues to be denied programming from certain vertically integrated programmers (by virtue of USSB's exclusive deals and/or the cable programmers' refusals to deal), it has not yet filed such a complaint because it had hoped that negotiations would be productive.

Nevertheless, since the end of the formal reply rounds in the program access reconsideration process, it has become increasingly evident that the FCC is being goaded by cable interests and USSB to opine on the broader issue of the propriety of exclusive contracts between vertically integrated programmers and non-cable MVPDs under all of Section 628. The narrow question of the statutory interpretation of Section 628 (c)(2)(C) raised by NRTC has been recast by these parties into a much broader and more far-reaching inquiry, i.e., what portions of Section 628 of the 1992 Cable Act apply to arrangements between vertically

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5/ See Joint Amicus Curiae Memorandum of Law of DIRECTV, Inc., National Rural Telecommunications Cooperative, Consumer Federation of America, and Television Viewers of America, Inc., State of New York v. Primestar Partners, L.P., et al., No. 93-CIV-3868 (JES) (July 16, 1993).

6/ See Reply of DIRECTV, Inc., MM Docket No. 92-265 (July 28, 1993), at 2-4 (noting that "oppositions to a particular petition for reconsideration provide neither adequate notice nor record support for any broad determinations as to the competitive harm of exclusive contracts between vertically integrated programmers and non-cable MVPDs").

integrated programmers and non-cable MVPDs? If the cable industry is successful here in convincing the Commission to issue broad pronouncements favoring exclusivity -- a result utterly inconsistent with the statute, the Commission's rules and Congressional intent -- then the program access provisions of the 1992 Cable Act will be eviscerated.

First, if exclusive distribution contracts between vertically integrated programmers and non-cable MVPDs are deemed to be per se acceptable, then vertically integrated programmers can continue to strategically "carve up" DBS programming packages in a manner that virtually ensures that consumers will pay more for a full complement of programming when purchasing service from competing DBS providers -- by being forced to piece together program offerings from services offered by multiple DBS operators -- than when purchasing from a single cable operator offering the same programming in an integrated package. Vertically integrated programmers thus will be given carte blanche to fragment the emerging DBS market and to substantially weaken DBS competitors.

Second, crucial aspects of the program access rules with respect to exclusionary practices remain to be developed through the Commission's complaint and enforcement process, which will also involve provisions of the 1992 Cable Act other than the specific limitations on exclusive contracting set forth in Sections 628(c)(2)(C) and (D). Exclusive arrangements between vertically integrated programmers and non-cable multichannel video programming distributors in many circumstances, for example, violate Section 628(b)'s general prohibition of "unfair practices" which hinder significantly or prevent any MVPD from obtaining access to cable programming. In addition, they violate

Section 628(c)(2)(B)'s prohibition against discrimination by a vertically integrated satellite cable programming vendor in the prices, terms and conditions of sale or delivery of satellite cable programming "among or between cable systems, cable operators, or other multichannel video programming distributors."[7/] A broad pronouncement that exclusive contracts between vertically integrated programmers and non-cable MVPDs are per se acceptable would make it virtually impossible for any specific program access complaint to proceed under these provisions.

Because USSB has obtained exclusive programming arrangements from HBO and Viacom, it appears that USSB has chosen to "carry the water" for the cable industry on this issue. Thus, following months of frenetic lobbying at the FCC and at Congress, USSB leveled a vitriolic attack on both NRTC and DIRECTV in the USSB Ex Parte. Stripped of its invective, much of the USSB filing is irrelevant, misleading, or flatly incorrect. The broader substantive points raised by USSB do merit a brief response, however, because they are so clearly contrary to the language and spirit of Congress's program access protections.[8/]

The cable-friendly positions set forth in the USSB Ex Parte are unfortunate because they are raised by a member of the very class of video provider that the 1992 Cable

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7/ Section 628 (c)(2)(B) (emphasis added). HBO conveniently ignores these provisions, arguing that "[t]he Act and the legislative history give no indication that Congress believed there was a problem with exclusive contracts between programmers and DBS operators or that Section 628 should encompass such contracts." HBO Ex Parte at 6.

8/ Viacom and HBO have followed suit with more low-key ex parte filings that predictably mirror the major positions set forth in the USSB Ex Parte. Points covered here in response to USSB apply to the arguments raised by Viacom and HBO as well.

Act was designed to protect. The USSB/Viacom/HBO theory of program access undermines the Commission's efforts to ensure that all alternative MVPDs gain access to vertically integrated cable programming. Moreover, the distortions and increasing confusion that USSB has generated through its lobbying efforts and ex parte presentations have played directly into the hands of cable interests.

Because the issue is now before the Commission, DIRECTV believes that it is in the public interest for the Commission to move ahead and decide the broad issue that USSB, Viacom and HBO have pressed. The Commission must not allow these parties to "gut" the program access provisions of the 1992 Cable Act. Instead, the Commission should clarify unequivocally that all exclusive contracts between vertically integrated programmers and non-cable MVPDs are presumptively disfavored -- and in the case of unserved areas, prohibited altogether -- in light of the purpose and legislative scheme of the 1992 Cable Act's program access provisions.

II. THE USSB/VIACOM/HBO THEORY OF PROGRAM ACCESS WOULD PERMIT THE CABLE INDUSTRY TO "MANAGE" OR STIFLE COMPETITION IN THE PROVISION OF VIDEO PROGRAMMING

The purpose of the 1992 Cable Act is to encourage competition to cable from alternative multichannel video distributors. The USSB/Viacom/HBO view of program access dangerously undercuts this purpose.

A. **Exclusive arrangements with vertically integrated programmers promote the cable industry's broader strategy of controlling and carving up the new DBS industry.**

USSB admits that the intent of Congress in passing the Cable Act was "to eliminate practices in the vertically integrated cable industry that were threatening the development of new technologies and inhibiting the provision of service to the public." Yet, USSB has lobbied vigorously -- before Congress, the FCC and a federal court -- that it is entirely consistent with the Cable Act for vertically integrated programmers to strategically offer their programming to one alternative MVPD provider on an exclusive basis. This position is simply not reconcilable with the congressional purpose of ensuring "competitive access to programming by all competing multichannel video programming distributors."[9/]

USSB's position may be summed up as follows:

> Time Warner and Viacom have not refused to make their programming services available **over DBS**. Time Warner and Viacom have dealt with USSB in arrangements that will enable USSB to distribute their programming nationwide, in competition with cable operators everywhere. Indeed, that was the objective of the program access provisions of the Cable Act.[10/]

Distilled to its essence, USSB's argument is that a vertically integrated programmer's sole obligation under the program access provisions of the Cable Act is to deal on an exclusive basis with only one alternative MVPD. Such a claim is simply another variation on the cable industry's losing argument that its compliance with the program access rules should be measured by whether the practices complained of can be shown to harm competition to the

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9/ State of New York v. Primestar Partners, L.P., FCC Amicus Memorandum at 1.

10/ USSB Ex Parte at 14 (emphasis supplied).

DBS or MVPD industries, and not to particular MVPD competitors. This position was flatly rejected by Congress.[11/]

The USSB/Viacom/HBO position favoring exclusive arrangements with vertically integrated programmers was also rejected by the FCC, which was faithful to the mandate of Congress in drafting the implementing regulations for the 1992 Cable Act's program access provisions. First, such exclusive arrangements violate Section 628(b)'s general prohibition of "unfair practices" which hinder significantly or prevent any MVPD from obtaining access to cable programming.[12/] Second, Section 628(c)(2)(B) of the Act prohibits discrimination by a vertically integrated satellite cable programming vendor in the prices, terms and conditions of sale or delivery of satellite cable programming "among or

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11/ USSB has always been aligned with cable interests on this issue. USSB admits that it "favored the Manton-Rose amendment, which was not adopted, rather than the Tauzin amendment, which was ultimately adopted." USSB Ex Parte at 2 n.1. The Manton-Rose Amendment was much more lenient on cable interests than the Tauzin Amendment, and would have imposed a far more onerous burden on alternative MVPDs to show an unreasonable restraint "on competition" rather than that a particular competitor was being denied programming. Congress spoke firmly and unequivocally in rejecting the Manton-Rose Amendment -- and thus the USSB/Viacom position -- in favor of the Tauzin Amendment. USSB cannot now be heard to resurrect debate on this issue when Congress has spoken.

12/ The Commission has stated:

> Elements of an offense under this provision would, however, include a demonstration that "the purpose or effect" of the conduct was to "hinder significantly or prevent any multichannel video programming distributor from providing . . . programming to subscribers or consumers."

Program Access Order at 16, ¶ 41 (emphasis supplied). Here, the "purpose or effect" of the HBO and Viacom exclusive arrangements with USSB, a competing DBS provider, has resulted in the denial of crucial programming to DIRECTV such that DIRECTV is unable to offer the programming to its consumers. Such an arrangement clearly violates the statute and Section 76.1001 of the Commission's rules.

between cable systems, cable operators, or other multichannel video programming distributors, or their agents or buying groups." The text of the Program Access Order makes it plain that non-price discrimination is covered by Section 628(c), including "unreasonable refusals to sell" and other exclusionary practices. Unreasonable refusals to sell include "refusing to sell programming to a class of distributors, or refusing to initiate discussions with a particular distributor when the vendor has sold its programming to that distributor's competitor."[13/] For vertically integrated programmers to make their programming available to one particular distributor on an exclusive basis, and then absolutely refuse to sell to a competing distributor, violates Section 628(c)(2)(B) of the 1992 Cable Act. This is the precise scenario that has hindered DIRECTV in its efforts to obtain HBO and Showtime, which have been provided to USSB on an exclusive basis.

As the sole beneficiary of exclusive programming arrangements with vertically integrated cable programmers, USSB's interest in vigorously defending these arrangements is understandable. From the FCC's perspective, however, there is a much larger policy concern at stake, i.e., cable's continuing ability to impede the competitive development of the DBS industry. The program access scheme advocated by USSB, Viacom and HBO -- like the scheme the cable MSOs succeeded in building into the Primestar Partners consent decrees -- permits vertically integrated programmers to sell an incomplete set of different critical programming on an exclusive basis to different DBS providers. This gives cable

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13/ Program Access Order at ¶ 116 (emphasis supplied). The Commission has stated that it will look to "certain antitrust precedents" and other legal principles to define what is "unreasonable." Id.

monopolies an extraordinary weapon with which to "hobble" DBS and other alternative MVPD competitors.

At 101° W.L., for example, DIRECTV has been absolutely denied in its efforts to obtain either HBO or Showtime. Thus, in order for a DBS customer to gain a package of programming that is the complete equivalent to a package offered by a single cable operator (which does, of course, carry HBO and Showtime), that customer must buy both DIRECTV and USSB programming packages. Purchased together, these two services will almost certainly cost more than the single integrated programming packages offered by either cable operators or Primestar Partners, the cable-owned direct-to-home (DTH) service. Customers will also be denied the economies of "one-stop shopping" offered by cable operators and Primestar, and instead must deal with two customer service centers, two bills and potentially two sales staffs in order to obtain a complement of program offerings equivalent to that offered by cable providers.[14/]

HBO seeks to deflect attention from this issue by highlighting the "very limited" nature of its exclusive arrangement with USSB: "It does not give USSB exclusivity against MMDS, SMATV, C-band satellite distributors, cable operators, DBS distributors at other orbital slots, video dialtone providers, or any other distributors."[15/] Yet, two implicit

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14/ For this reason, USSB's unceasing efforts in recent weeks to demonstrate that the RCA DSS receiving system is technically capable of the seamless receipt of both USSB and DIRECTV service completely misses the point. USSB and Directv are separate licensees with different business plans and program packages, and the USSB/HBO/Viacom position mandates that consumers order and pay for two separate DBS services in order to match the offerings of one cable provider.

15/ HBO Ex Parte at 8.

points follow from this statement. First, HBO's assertion suggests quite clearly that DIRECTV, as the only other provider at the 101°W.L. orbital location, in the short-term has been uniquely targeted by cable interests and has been completely "locked out" of any access whatsoever to HBO[16/] through the exact behavior that the 1992 Cable Act was intended to prevent.[17/] Second and more important, the precise parameters of the USSB/HBO and USSB/Viacom exclusivity arrangements are irrelevant to the extent that USSB, HBO and Viacom all seek to establish the broad proposition that exclusive contracts between vertically integrated programmers and non-cable MVPDs are per se acceptable under the 1992 Cable Act. If this is the case, then any one of the non-cable technologies cited by HBO can be targeted for similar discrimination and fragmented through the imposition of a web of exclusive arrangements whose scope need not be restricted in any fashion. Exclusive

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16/ DIRECTV thus far has been able to adjust its business plan in spite of the anticompetitive circumstances and behavior that have hindered its attempted dealings with Viacom, HBO and USSB. Nevertheless, without the premium class of cable services (e.g., HBO and Showtime) DIRECTV will be forced to rely almost exclusively on pay-per-view to satisfy customer demand for "current hit" movies. Pay-per-view requires significantly more capital, customer service costs, installation complexity and channel capacity to compete. In addition, contracts between some studios and some premium services include strict guidelines on the marketing and packaging of pay-per-view offerings that have the effect of limiting the possibilities for pay-per-view success. Thus, the exclusivity arrangements between USSB and vertically integrated programmers have already had tangible impacts and created additional hurdles that DIRECTV must overcome to succeed in offering a competitive alternative to cable.

17/ See Program Access Order at 4, ¶ 9 (observing that "in enacting the program access provisions of the Cable Act, Congress expressed its concern that potential competitors to incumbent cable operators often face unfair hurdles when attempting to gain access to the programming they need in order to provide a viable and competitive multichannel alternative to the American public"); see also 1990 Cable Report, 5 FCC Rcd. at 5031 ("It seems fairly clear from the above facts that vertically integrated MSOs have the ability to limit competition to particular programming services.").

arrangements could be crafted to span alternative MVPD technologies and orbital locations at the whim of the cable industry and vertically integrated programmers.

Indeed, if the USSB/Viacom/HBO theory of program access were adopted, HBO and Viacom presumably could, at the end of the terms of USSB's exclusive agreements, enter into exclusive programming agreements with Primestar, the cable-owned DTH entity, and could make the arrangements exclusive across orbital locations and alternative technologies, thereby denying the programming to both USSB and DIRECTV. The USSB/Viacom/HBO theory thus allows the cable industry to "set the table" to extend its monopoly power into DBS, and to weaken or lock out altogether other video competitors. To say that the Commission's program access provisions could be plausibly read to accommodate such a perverse result illustrates the untenable nature of USSB's position.

B. The USSB Ex Parte is replete with misstatements and irrelevancies that seek to cloud the anticompetitive nature of the USSB/Viacom/HBO arrangements.

The interpretive issue raised by NRTC's petition is important, but narrow and relatively straightforward: does the text of Section 628(c)(2)(C) impose a per se ban on exclusive arrangements between vertically integrated programmers and non-cable MVPDs in areas unserved by cable? Now, however, the broader question before the Commission is whether any of Section 628's provisions prevent vertically integrated programmers from strategically choosing one MVPD representative of an entire industry in an anticompetitive effort to deny programming to other MVPD players in that industry. The arguments raised in the USSB Ex Parte are designed to skew this answer in a misleading and confusing

manner that inures solely to the benefit of vertically integrated cable interests and USSB. DIRECTV below responds to some representative statements by USSB that are misleading, irrelevant or simply incorrect.

- **"DIRECTV will always have significantly more channels than USSB; USSB will never have the channel capacity to compete with DIRECTV for much of the programming DIRECTV proposes to offer . . . . As long as one DBS service provider controls far more channels than the other, the only way the one with fewer channels will remain competitive is if it obtains exclusive rights to its programming." (pg. 27).**

For over ten years, USSB has been one of the most visible and high-profile DBS applicants, and contrary to its continual effort to portray itself as a DBS David to DIRECTV's Goliath, USSB is part of the well-financed and sophisticated Hubbard Broadcasting group.[18/] USSB chose to apply for the DBS capacity it received, presumably in accordance with a business plan. For USSB to now insist that its voluntary business decision to apply for five channels at 101° W.L. is now entitled to some special regulatory protection turns public policy on its head.

Moreover, USSB does not need exclusive agreements with vertically integrated programmers to differentiate itself as a competitor. It can become the low-cost producer; it can market its product differently; it can have differential distribution arrangements; or it can, like DIRECTV, enter into exclusive distribution agreements with non-vertically

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18/ The trade press reports that Hubbard Broadcasting owns USSB; seven TV stations in Minnesota, New Mexico and Florida; two "satellite TV stations"; an AM-FM combo in Minneapolis/St. Paul; newsgathering agency Conus Communications; and two production companies in Florida. Tellingly, Hubbard also co-owns the satellite-delivered All New Channel with Viacom. See S. Scully, Countdown to DBS, Broadcasting & Cable (Dec. 6, 1993).

integrated programmers, which is perfectly permissible under the 1992 Cable Act. To argue that its Vichy-like collaboration with vertically integrated programming interests promotes competition -- when in fact the result is the continued systematic exclusion of other alternative video distributors from gaining access to such programming -- is to advocate the evisceration of the program access rules.

- **"DIRECTV . . . originally sought to acquire on an exclusive basis programming obtained by USSB, including (according to representatives of HBO) programming from Time Warner's HBO." (pp. 3, 16).**

DIRECTV explored the feasibility of a number of possible programming arrangements -- exclusive and otherwise -- with a variety of vertically integrated and non-vertically integrated programmers before passage of the 1992 Cable Act, but did not pursue exclusives with vertically integrated programmers after the 1992 Cable Act's passage. In fact, it was precisely DIRECTV's experience with the monopoly power of the vertically integrated programming interests that drove home the fact that DIRECTV was not yet dealing with any kind of competitive market. It also was clear that no relief would be forthcoming for emerging DBS providers and other alternative MVPDs on the program access front without congressional and FCC intervention. Unlike USSB, DIRECTV has no exclusive arrangements with any vertically integrated programmers.

- **"USSB's programming agreements do not violate the act or the Commission's Rules and are not contrary to the public interest. [¶] In fact, in recent Comments published in the Federal Register in connection with the proposed Final Judgment in United States v. Primestar Partners, L.P., et al. . . . the U.S. Department of Justice, Antitrust Division, specifically disputed similar arguments raised in Comments filed by DIRECTV and NRTC in opposition to certain provisions of the proposed**

Final Judgement that addressed DBS and the issue of exclusive program contracts."

The Comments by the Justice Department in the Primestar Partners proceeding are irrelevant. These Comments were focused on the propriety of exclusive arrangements under the cable-friendly regime negotiated by the cable industry with the state attorneys general and enshrined in the Primestar consent decrees, not the FCC or the Cable Act's program access regime -- which is precisely why DIRECTV weighed in as an amicus curiae in that case. Indeed, USSB's citation of such evidence is proof positive of exactly what DIRECTV and others predicted that USSB and cable interests would do, i.e., attempt to rewrite the intent and effect of the program access provisions by focusing the reconsideration process on the decrees at issue in the Primestar/State AG proceeding, and promoting them as a measure of the alleged public interest in allowing exclusive contracts between vertically integrated programmers and non-cable MVPDs. Fortunately, the FCC recognized and exposed this tactic in its Primestar amicus memorandum.[19/] Here, the FCC should again recognize USSB's attempts to preserve its prohibited deals for what they are and accord no weight to any statements in the Primestar proceeding.

- **"Affording DIRECTV the right to duplicate USSB's programming will only serve to reduce the number and variety of programming choices for the consumer. For every channel duplicated, the consumer loses a potential channel of diverse programming." (pg. 17).**

A central theme of the USSB and cable filings is that DIRECTV should be denied access to vertically integrated cable programming that USSB possesses because

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19/ See FCC Amicus Memorandum at 14.

customers will have the capability of receiving programming offered by both DIRECTV and USSB through a shared DSS receiver. Thus, if a customer subscribes to both services, the argument runs, the two services taken together will provide competition to cable, and the Commission should therefore prevent DIRECTV from offering program offerings that are duplicative to those offered by USSB.[20/]

This position is absurd and contrary to both the public interest and the underlying premises of the 1992 Cable Act. First, the extent to which programming may be "duplicative" among video providers is consumer-driven, and in this context, the programming in question is already duplicated by cable operators, MMDS providers, C-band providers and Primestar. Indeed, the goal of the program access rules here is to ensure that individual MVPD competitors to cable each have the ability to deliver the particular programming that consumers have come to associate with multichannel subscription television -- programming such as HBO and Showtime.

Second, the USSB/Viacom/HBO position mandates a market where a cable operator with a full complement of programming faces equivalent competition from DBS providers only when the services offered by two DBS competitors are purchased together by the consumer. Thus, the USSB/Viacom/HBO program access theory gives vertically integrated programmers the ability to fragment the emerging DBS market and to substantially weaken DBS competitors, ultimately harming consumers and denying them the benefits of the very competition to cable that Congress intended to promote.

20/ See, e.g., HBO Ex Parte at 7-8.

Finally, and most fundamentally, although there are certain shared technical aspects of their distribution systems, USSB and DIRECTV are competitors and separate, independent DBS licensees. Each provider has the right to decide upon and secure whatever programming it believes will facilitate its respective business plan, whether or not programming is duplicative, and each provider has the right to gain access to programming from vertically integrated programmers on a fair and non-discriminatory basis. To suggest, as USSB, HBO and Viacom do, that the Commission must intervene to "centrally plan" each provider's programming lineup in order to avoid "duplicative" program offerings is neither the FCC's proper role nor in the public interest.

- **"[E]xclusive distribution contracts are a fact of life in the video distribution business, and have been for more than 40 years." (pg. 26).**

This point is a complete red herring and begs the central question at issue. This proceeding is not about the general competitive acceptability of exclusive contracting arrangements. DIRECTV has never been opposed to exclusive arrangements, which can serve valuable competitive purposes in protecting unique investments or building long-term relationships. Indeed, DIRECTV has actively pursued exclusive contracts in contexts where there is no legal/regulatory concern with such arrangements, including exclusives with non-vertically integrated program suppliers. The key issue here, however, which was a major driver of the 1992 Cable Act, concerns the effect that such exclusive contracts and arrangements can have on emerging competition in the video distribution market when wielded by cable monopolists and vertically integrated programmers.

The Commission addressed this issue squarely in the Program Access Order in addressing the operation of Sections 628(c)(2)(C) and (D), reasoning:

> As a general matter, the public interest in exclusivity in the sale of entertainment programming is widely recognized. . . In the unique situation presented here, however, it is clear that exclusivity is not favored. Congress has clearly placed a higher value on new competitive entry than on the continuation of exclusive distribution practices that impeded that entry.[21/]

With respect to Section 628(c)(2)(C) in particular, the Commission found:

> As for "other practices, understandings, arrangements and activities" that should come within the scope of our rules, we agree with those commenters who believe that any behavior that is tantamount to exclusivity should be prohibited in unserved areas. Any other interpretation would undermine the goals Congress sought to achieve by prohibiting exclusivity itself. Thus, our rules will prohibit vertically integrated programmers from engaging in activities that will result in de facto exclusivity, or from imposing requirements on MVPDs that prevent or restrict them from delivering their programming to any unserved area.[22/]

Prohibited exclusivity in the DBS industry is precisely the goal that HBO, Viacom and USSB seek, but it is directly contrary to congressional intent in enacting program access protections.

DIRECTV's experience illustrates that the strategic use of "exclusive" arrangements wielded by vertically integrated programmers has made it possible for the cable industry to refuse to offer programming to multiple providers at one orbital location, thus hampering the ability of both providers to compete with cable operators with a full complement of programming. Moreover, the USSB/Viacom/HBO argument taken to its

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21/ Program Access Order at ¶ 63 (emphasis supplied).

22/ Id. at ¶ 61 (emphasis supplied).

logical extreme would allow exclusivity to include all DBS providers at all orbital locations, or even all alternative MVPDs.

- **"USSB is not asking the Commission for any special treatment or consideration. USSB's programming arrangements are entirely consistent with the Cable Act, the Commission's regulations, and established industry practices." (pg. 30).**

Unfortunately, special accommodation for its own business decisions is precisely what USSB seeks through the regulatory process, even if obtaining such special treatment perverts the whole intent and effect of the FCC's program access rules. USSB has become an unfortunate conduit for the cable interests to mount a cynical attack upon the alternative MVPD industry by continuing to deal with DBS providers as it suits them, and to carve up the DBS market by selectively offering programming to only one strategically selected DBS provider. The Commission must not allow the Cable Act's program access protections to be gutted in this fashion.

III. CONCLUSION

The program access requirements of Section 628 have at their heart the objective of releasing programming to the existing or potential competitors of traditional cable systems. The Commission's rules to date have faithfully implemented this objective, and have provided a method of particularized access to these protections for all alternative MVPDs. USSB and the vertically integrated programmers, however, seek a regime whereby cable interests can strategically choose a favored alternative MVPD industry representative upon which to bestow exclusive programming deals in a manner that would render the program access rules a nullity. Depending upon the scope and breadth of the exclusive

arrangements, a vertically integrated programmer conceivably could deny access to programming to the rest of the entire alternative MVPD industry by dealing with only one provider. In addition, if Viacom, HBO and USSB succeed in persuading the Commission to "bless" exclusive arrangements between vertically integrated programmers and non-cable MVPDs, then the Commission's power to police program access violations through case-by-case enforcement of the 1992 Cable Act under provisions such as Section 628(b) and Section 628(c)(2)(B) will be severely constrained.

Congress did not intend such twisted results. The 1992 Cable Act sought to promote access to vertically integrated programming for each and every alternative MVPD, not simply a selected few or one. The public interest is far broader than USSB's interest in preserving its exclusive deals, and the Commission should not make any broad pronouncements that either implicitly or explicitly condone such arrangements. To the contrary, the Commission should declare exclusive arrangements between vertically integrated cable programmers and non-cable MVPDs to be presumptively violative of Congress's program access provisions and the specific protections found in the Commission's program access rules, and as the NRTC suggests, completely prohibited in unserved areas.

Respectfully submitted,

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